



June 17, 2002

Mr. Brad Norton
Division Chief
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2002-3267

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164385.

The City of Austin (the "city") received a request for several categories of information relating to the city's dealings with Capital Metro, the municipal transportation authority. You sought clarification of the request from the requestor, and you have submitted a copy of the requestor's written response. See Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). You state that some responsive information will be provided to the requestor. You indicate, however, that the city wishes to withhold internal documents responsive to parts 1(c) and 2(a) of the request, pertaining to documents stating the expectations of services to be provided by Capital Metro to the city, and documents that discuss, approve, agree, or contract on matters relating to Capital Metro's financial assistance with right-of-way acquisition and road construction, improvement, and maintenance. You claim that the requested information is excepted from disclosure under sections 552.104, 552.105, 552.106, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your claim that a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the deliberative process privilege. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 158 (Tex. App.--Austin 2001, no pet.) In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin

1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 158-161; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

You indicate that some of the submitted information consists of city staff advice, opinions, and recommendations as to the need of the city to enter into certain contracts that are not yet finalized, and the terms under which the city should enter those contracts. Further, you indicate that one of the submitted documents is a preliminary draft of a policymaking document to be released in final form. Based on your representations and our review of the submitted information, we find that the documents we have marked consist of draft policymaking documents and may be withheld under section 552.111 of the Government Code.

We next address your claim under section 552.105 of the Government Code. You have submitted city project file numbers 3629.01, 3629.07, 3629.08 and 3629.09, relating to a streetscaping project, to this office for review. You have also submitted for our review a file relating to right-of-way acquisition in the area of a state highway. As a preliminary matter, we note that some of the information in these files is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code §§ 552.022(a)(1), (a)(3). We find that the submitted appraisal reports and the marked consultant report constitute completed reports "made of, for, or by a governmental body." Therefore, the appraisal reports and consultant report must be released to the

requestor unless they are expressly made confidential under other law. You seek to withhold these documents under section 552.105 of the Government Code. Section 552.105 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision Nos. 564 (1990) (governmental body may waive statutory predecessor to section 552.105), 552 (1989) (discretionary exceptions in general). Therefore, the appraisal reports and consultant report may not be withheld under section 552.105 of the Government Code and must be released to the requestor.

We also note that the submitted project files contain copies of municipal ordinances. Municipal ordinances are matters of public record and may not be withheld from disclosure under the Public Information Act. Open Records Decision No. 551 (1990). Thus, the city may not withhold the marked municipal ordinances under section 552.105. The marked municipal ordinances must be released to the requestor.

We next address your claim under section 552.105 for the remaining portions of the submitted project files. Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted only until the transaction is either completed or aborted. Open Records Decision Nos. 357 (1982), 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

You state that the requested documents relate to ongoing projects involving the acquisition of rights-of-way and easements in particular areas. You indicate that these documents will disclose the location of particular properties involved while the city remains in negotiation

with the owners. You further state that release of the information would hamper the city's negotiating position in the future acquisition of nearby parcels, as well as damage the city's position with regard to the particular transactions currently in negotiation. Based on your representations and our careful review of the submitted information, we believe that you have demonstrated the applicability of section 552.105 to these documents. Thus, the city may withhold the remaining information in the submitted project files under section 552.105 of the Government Code.¹ We note, however, that the information may no longer be withheld pursuant to section 552.105 once the transactions at issue are either completed or aborted.

In summary, the city may withhold the marked documents reflecting the city's policymaking processes under section 552.111 of the Government Code. The city must release the marked completed appraisal reports and consultant report pursuant to section 552.022 of the Government Code. The marked municipal ordinances are public information and must be released. The city may withhold the remainder of the submitted information under section 552.105 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

¹As we address all of the submitted information under sections 552.111 and 552.105, we do not reach your arguments under sections 552.104 and 552.106 of the Government Code.

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/sdk

Ref: ID# 164385

Enc: Submitted documents

c: Ms. Melanie Oberlin
Save Our Springs Alliance
4611 Avenue C
Austin, Texas 78751
(w/o enclosures)